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Nos. 08-1553 & 08-1554

IN THE

Supreme Court of the United States

KAWASAKI KISEN KAISHA, LTD., *et al.*,

Petitioners,

-and-

UNION PACIFIC RAILROAD CO.,

Petitioner,

v.

REGAL-BELOIT CORPORATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* TRANSPORTATION AND LOGISTICS COUNCIL AND AMERICAN INSTITUTE OF MARINE UNDERWRITERS, IN SUPPORT OF THE RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Transportation & Logistics Council, Inc. is a not-for profit organization of some 350 companies that are principally manufacturers, shippers and receivers of freight nationwide. *See* www.tlcouncil.org. The Council's members are transportation and logistics professionals who are responsible for the shipping, receiving and distribution needs of their companies. Among the various functions these transportation professionals are responsible for are administration of claims for loss, damage and delay, freight charge auditing and payment, cargo insurance, carrier selection, and the negotiation of transportation agreements with motor, rail, air and ocean carriers.

The American Institute of Marine Underwriters (AIMU), a non-profit association, represents 36 United States marine insurance companies which underwrite approximately 90 percent of the marine risks insured in this country. AIMU thus serves as an advocate, source of information and center for education. *See* www.AIMU.org. In 2008, AIMU's members underwrote marine insurance policies with collective premiums of more than $2.6 billion. The insured value of the goods and vessels insured under their policies total hundreds of billions of dollars. More than a third

[1] Both Petitioners and the Respondents have filed blanket consents to the filing of *amici* briefs. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

of those insured values represent cargo shipped in United States foreign trade, including through multimodal shipments such as the one involved in this case. AIMU, on behalf of its members, works in cooperation with the United States Government and international bodies to improve the legal environment for international trade (such as in connection with the recently-signed Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea- "The Rotterdam Rules").

INTRODUCTION

Shippers come in all shapes and sizes

A shipper could be a small start-up company designing ultra-efficient batteries for electric cars. A shipper could be an artist, right out of school, who is selling her first sculpture. A shipper could be an executive, retiring to the south of France, transporting his most precious personal heirlooms. A shipper could be a giant like Wal-Mart, though in most cases, shippers are not massive enterprises. Statistically, 97.3% of all American exporters are small businesses (defined as having fewer than 500 employees).[2]

At some point, for every shipper, and for every importer, there will be a shipment that goes astray. If the value is small, and there is no compensation, it will be a bad day. If the value is large, and there is no compensation, it could mean bankruptcy.

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[2] SBA, Office of Advocacy, *Frequently Asked Questions, available at* http://www.sba.gov/advo/stats/sbfaq.pdf.

This Court's decision in the pending matter will thus have a significant impact on the rights and obligations of nearly every shipper and importer in America.

The one thing that everyone agrees upon is that shippers, particularly America's 17 million small businesses, accounting for 51 percent of our nation's sales,[3] cannot adequately defend their interests in negotiations with carriers absent a regulatory framework. That is why virtually every major country in the world has enacted some legal framework for negotiations concerning ocean, trucking, or rail shipments. That is why the Carmack Amendment was enacted in 1906, and that is why the Carriage of Goods by Sea Act was enacted in 1936. Even today, the United States government concedes that:

> . . . a certain inequality of bargaining power between the shipper and the carrier is assumed to exist.[4]

The government made that statement in the context of the international ocean liner industry, wherein, as discussed *infra*, 20 companies control 80% of the market share.

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[3] U.S. DEP'T OF LABOR, OFFICE OF DISABILITY EMPLOYMENT POLICY, SMALL BUSINESS IN AMERICA, *available at* http://www.dol.gov/odep/pubs/ek00/small.htm.

[4] Mary Helen Carlson, *U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, 31 TUL. MAR. L.J. 615, 625 (Summer 2007).

The railroad industry is such that four mega-railroads[5] account for 95% of the industry's traffic. WILLIAM J. AUGELLO, TRANSPORTATION LOGISTICS AND THE LAW 31 (1st ed., Transportation Consumer Protection Council, Inc. 2001). For America's 17 million small businesses to fairly and effectively negotiate with them, absent some regulatory framework, is simply impossible. Indeed, these four mega-railroads, which operate under anti-trust immunity, under subchapter IV of Title 49, control over 107,500 miles of railroad track in this country. As to be expected, their dominance has been enormously profitable for them, with multi-billion dollar profits for the first 9 months of 2009.[6] *See* Oligopoly Watch, *Industry brief: US railroads* (Nov. 1, 2003), *at* www.oligopolywatch.com/2003/11/01.html. It is a matter of public knowledge that the net result of having such few railroads control the vast majority of the industry's business is that a virtual monopoly exists in each region of the country, providing shippers with a single option for transporting their goods by rail in a given region.[7]

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[5] These four railroads are the Petitioner Union Pacific, as well as Burlington Northern Santa Fe ("BNSF"), CSX Corporation and Norfolk Southern. WILLIAM J. AUGELLO, TRANSPORTATION LOGISTICS AND THE LAW 31 n.50 (1st ed., Transportation Consumer Protection Council, Inc. 2001).

[6] SURFACE TRANSP. BOARD, CLASS 1 RAILROAD ANNUAL REPORT, *available at* http://www.stb.dot.gov/stb/industry/econ_reports.html.

[7] Union Pacific and BNSF dominate the West, and CSX and Norfolk Southern dominate the East. *See* Oligopoly Watch, *Industry brief: US railroads* (Nov. 1, 2003), *at* www.oligopolywatch.com/2003/11/01.html.

Any argument that an individual shipper or a small business has either the means or the economic clout to rewrite a Chinese jurisdiction clause in a preprinted form bill of lading or to insist that Union Pacific offer it a full liability option to carry its goods is just as preposterous as arguing that a consumer renting a car can effectively rewrite a car rental contract. In the real world it simply does not happen unless a consumer friendly framework exists in the form of the Carmack Amendment's protective structure, which does not insure a particular outcome in terms of the venue and liability options being offered, but does require a fair process and at least some choices.

Put simply, this case is about giving effect to Congress' intent that the U.S. Railroads operate within a regulatory framework which requires them to offer reasonable jurisdictional and liability contract options – not outcomes – to rail shippers of goods as a condition of possessing such extraordinary regional monopolies. The alternative would be to create a regulatory vacuum, allowing Railroads to end run the Carmack Amendment's liability and venue provisions, thereby creating serious disuniformity in outcomes, drastically increased litigation costs for American businesses, and serious disincentives for carriers to adequately invest in caring for cargo.[8]

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[8] An example of the type of clauses which railroads unilaterally insert in their tariffs can be found in Union Pacific's own MITA which provides, *inter alia,* that it is not liable for damage unless the container is opened and "visibly checked" at the U.S. port of entry (a virtual impossibility) (310-C (c) (9)); that it is not liable unless "clear and convincing" evidence is presented (which completely reverses Carmack's (Cont'd)

SUMMARY OF ARGUMENT

1. As a matter of public policy, keeping cargo cases in the United States promotes certainty in settling such claims. Only a tiny fraction of cargo claims are sent to lawyers to handle or result in litigation. For many decades, the vast majority of such claims have been promptly and amicably resolved by U.S.-based cargo claims adjusters due to the familiar liability and time-bar schemes imposed by Carmack and COGSA. The Carmack Amendment ("Carmack") has covered liability of railroads since 1906 (and of motor carriers since 1935). The statute is presently codified at 49 U.S.C. §11706 (rail) and §14706 (trucking). The U.S. Carriage of Goods By Sea Act ("COGSA") covering ocean carriers was enacted in 1936. 46 U.S.C. § 30701 (Notes).

Each of these longstanding statutes has a unique liability scheme which is very familiar to the claims people in the cargo industry (and their counterparts on the carrier side). COGSA always provides at least one year to file a lawsuit; Carmack always provides at least two years. This certainty provides a window of time in which to pursue amicable settlement without resort to lawyers and the courts. Reversal of the decision below, however, endangers this well-settled scheme and creates a "no man's land" of unregulated cargo movements

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(Cont'd)
presumptions) (310-C (c) (9)); that only its customer or assignee (i.e. the multimodal bill of lading issuer) can make claim (attempting to prevent any claims by the actual cargo owner) (310-C (E)). Master Intermodal Transportation Agreement (MITA), Union Pacific Exempt Circular MITA 2-A, *available at* http://www.uprr.com/customers/intermodal/mita.shtml.

which will almost certainly result in rail carriers asserting (i) foreign jurisdiction clauses as well as (ii) one, two or three month time bars in bills of lading. Thus, rather than the amicable and fair out-of-court settlements promoted by the current framework, reversal of the case below would result in the following: where every meaningful party is American-based, the loss occurs in the United States, and all of the evidence is located in the United States, multimodal cargo claims will nonetheless have to be sent to and resolved by foreign lawyers in a myriad of foreign courts, wherein access to witnesses and evidence will be cost-prohibitive, if accessible at all, and justice will rarely be achieved. *See infra* Point I.

2. Solemn representations of the state of the law were previously propounded by the Association of American Railroads (which includes Union Pacific among its largest members) and by an individual railroad—to a United Nations Committee and in numerous litigations—that the Carmack Amendment did indeed regulate the U.S. leg of all multimodal movements, resulting in these movements being excluded from a proposed new landmark international cargo treaty known as "The Rotterdam Rules." *See infra* Point II.

3. Industry long ago accepted that, as a matter of law, Carmack applies to the U.S. ground transportation leg of an multimodal shipment regardless of whether a separate inland bill of lading is issued. In fact, this Court has already ruled in *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317 (1921) that Carmack does apply in such circumstances. *See infra* Point III.

4. In any event, if not affirmed, under the proper test this matter must be remanded to the District Court to determine the jurisdictional and liability terms of the railroad's domestic waybill. *See infra* Point IV.

5. True uniformity can be accomplished, at virtually no cost, while preserving international and true substantive uniformity, if the transportation industry modifies a single clause already present in most multimodal bills of lading to incorporate and offer a Carmack Amendment option to shippers. *See infra* Point V.

ARGUMENT

I

For Decades the Carmack Amendment Has Been a Vital and Effective Regulatory Framework. Allowing Railroads to End Run Its Venue Provisions for Multimodal Losses Would Create a Regulatory Vacuum, Serious Disuniformity in Outcomes, Drastically Increased Litigation Costs and Serious Disincentives to Invest in Adequate Care for Cargo

Requiring a separate inland bill of lading for the Carmack Amendment[9] to apply to claims against inland rail carriers[10] violates the vital public policy of promoting

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[9] Now codified at 49 U.S.C. § 11706 (for rail carriers) and 49 U.S.C. § 14706 (for motor carriers).

[10] *Amici curaie* do not address the liability of Petitioner Kawasaki Kisen Kaisha Ltd. ("K-Line"). Rather, they rely upon the points asserted in Respondents' brief on this issue and respectfully refer the Court to that brief.

certainty in settlements of cargo claims outside of Court. Indeed, requiring an Oklahoma train derailment to be litigated in a foreign jurisdiction such as Japan, where no witnesses exist (and no depositions are permitted) is in itself so "seriously inconvenient" that it violates the fundamental fairness principles laid down in *M/S Bremen (and Unterweser GmbH) v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972). The *Bremen* test mandates that enforcement of such a clause against a Plaintiff can not be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 18. Requiring American manufacturers, importers and shippers to sue inland railroads for minor claims in far flung jurisdictions clearly violates the principle set forth in *Bremen.* Indeed, as correctly pointed out by Petitioners, with over 100 separate ocean carriers utilizing the Port of Long Beach alone, each one having its own jurisdiction clause, and given that a single train derailment can easily involve dozens of containers, if the decision below is reversed, it would become the norm for cargo losses in separate containers from one accident to wind up being litigated in a score of different countries, with each American witness involved in turn spending months shuttling from country to country, the most inefficient possible result.

Over $8 trillion of goods are shipped in the U.S. each year. *See* Research and Innovative Technology Administration: Bureau of Transportation Statistics, *Table 1-52: Freight Activity in the United States: 1993, 1997, and 2002, available at* www.bts.gov/publications/national_transportation_statistics/html/table_01_52.html. Over $1 trillion are multimodal shipments. *Id.* Only about .63% of shipments result in a

loss or shortage claim. *Transit Loss Prevention & Security Association Motor Carrier Survey (2005)*, IN TRANSIT, Spring 2006. For most of these shipments, there *is no insurance*. U.S. DEP'T OF TRANSP., CARGO LIABILITY STUDY ¶ 4.1.4, p. 22 (1998), *available at* http://ntl.bts.gov/lib/22000/22900/22922/cargolivab.pdf.

The vast majority of cargo claims are resolved promptly, without litigation. One study found that 97% of cargo claims are resolved within 120 days of filing of the claim. *Transit Loss Prevention & Security Association Motor Carrier Survey (2005)*, IN TRANSIT, Spring 2006. By one estimate less than one quarter of one percent (.25%) of all cargo claims result in litigation. Rail Carriers Cargo Liability Study, Ex Parte No. 403 (I.C.C. Oct. 9, 1981), *reprinted in* WILLIAM AUGELLO AND GEORGE PEZOLD, FREIGHT CLAIMS IN PLAIN ENGLISH (3rd ed. 1995) Vol II, App. 90, p. B-150-151 (also noting that "there is no current problem involving needless [rail] litigation" and "the prevailing reason that claimants commence court action is the inability to secure needed information from the [rail] carrier"). Experienced claims adjusters know that a large portion of these claims are under $1,000 and it is nearly certain that the vast majority are under $10,000.[11]

Why is there such a remarkable rate of resolution of these small claims without resort to the courts? Most claims are resolved between the claims departments of cargo underwriters and claims advisors working for

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[11] Claims under $10,000 are generally subject to the Carmack Amendment but are not subject to jurisdiction in federal court pursuant to 28 U.S.C. § 1337(a).

carriers (or their insurers) without either side *ever hiring attorneys*. These claims personnel are very familiar with the fundamental outlines of the three mandatory liability schemes adopted by Congress:

Carmack: (for inland losses)	Minimum 9 month to claim/*2 years from claim declination to sue*; specific venue in U.S.; limitation of liability if agreed to byshipper; only common law defenses available to carriers.
COGSA:[12] (ocean losses)	*1 year to sue*; $500 per package limit (unless deviation); various defenses (including due diligence); venue not specified, foreign jurisdiction clauses can be upheld.
Montreal Convention:[13] (air losses)	*2 years to sue*; 17 SDR (presently about US $26.00) per kilo limit of liability; limited defenses; specific venue choices

[12] Previously codified at 46 U.S.C. app. § 1300-15; now located in 46 U.S.C. § 30701 (Notes).

[13] Convention for the Unification of Certain Rules for International Carriage by Air (1999).

> (including for United States imports, suit in the United States).

Thus, when a claim lands on their desk, these claims professionals immediately know the ground rules for resolution. They also know that for ocean claims *they have at least one year and for inland claims two years before they need to contact a lawyer.* That is, they knew up until now. Reversal of the decision below will cast a pall of uncertainty over this currently reliable and effective framework by making the resolution of claims wholly dependent on arbitrary time to sue terms (perhaps even one or two months) and obscure and inconvenient forums unilaterally designated by ocean carriers in pre-printed multimodal bill of lading forms. In addition, whether a separate inland bill of lading is issued is, as a practical matter, likewise entirely out of the control of most (especially small) shippers.

As the U.S. Department of Transportation itself found in rejecting calls for a change of Carmack's 2 year time to sue:

> Consideration of efficiency and **international harmony**, as well as the ease of keeping the familiar time limitation, are arguments in favor of continuing the existing time limits. **There are no strong arguments for changing the time limits.**

U.S. DEP'T OF TRANSP., CARGO LIABILITY STUDY ¶ 5.1.6 (1998), *available at* http://ntl.bts.gov/lib/22000/22900/22922/cargolivab.pdf (emphasis added).

Reversal of the holding of the Court below would immediately mean that Carmack's minimum 2 years to sue does not necessarily apply to interstate multimodal shipments originating from outside the U.S. and would destroy that uniformity and certainty. This, despite the fact that Congressional intent could not have been clearer in the Carmack Amendment that a carrier cannot lessen the two year time to sue:

> A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section.

49 U.S.C. § 14706(e)(1).

As a result of this Court's legal sea change in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), most multimodal bills of lading today covering shipments to and from the United States contain foreign jurisdiction clauses. This is not surprising given that there are no large U.S. ocean carriers remaining, and the vast majority of ships that service our ports today are foreign-owned.[14] And yet, even in the fifteen years

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[14] In 2010, the twenty largest ocean carriers by container volume were identified as follows.* Within particular routes, the choices of carriers are of course considerably narrower.

Rank	Operator	Market Share
1	APM-Maersk (Denmark)	14.9%
2	Mediterranean Shg Co (Switzerland)	11.1%

(Cont'd)

(Cont'd)

3	CMA CGM Group (France)	7.7%
4	Evergreen Line (Taiwan)	4.0%
5	APL (Singapore)	3.9%
6	Hapag-Lloyd (Germany)	3.5%
7	COSCO Container L. (China)	3.3%
8	CSCL (China)	3.2%
9	Hanjin Shipping (Korea)	3.1%
10	NYK (Japan)	3.0%
11	CSAV Group (Chile)	2.6%
12	OOCL (Hong Kong)	2.5%
13	MOL (Japan)	2.5%
14	K Line (Japan)	2.4%
15	Hamburg Sûd Group (Germany)	2.3%
16	Zim (Israel)	2.3%
17	Yang Ming Line (Taiwan)	2.2%
18	Hyundai M.M. (Korea)	2.1%
19	UASC (Middle East)	1.5%
20	PIL (Pacific Int. Line) (Singapore)	1.4%

* *Alphaliner - Top 100 Operated Fleets as per 1 February 2010, at* http://www.axs-alphaliner.com/top100/index.php.

subsequent to the *Sky Reefer* decision, among the scores of reported federal cargo cases filed annually under multimodal bills of lading against railroads and truckers, no one in the various *amicus* briefs filed herein *has cited to a single case against an inland U.S. trucker or railroad that was actually pursued in a foreign forum.* Nor has anyone cited a prior case where an inland carrier moved to dismiss based upon a foreign forum selection clause. The explanation is simple: American manufacturers, shippers and inland carriers have long operated on the premise that the Carmack Amendment (including its forum selection provisions) controls interstate inland movements, even under multimodal bills of lading. In fact, that very position has been taken in prior litigation by a rail carrier. *See* cases cited under Point II, *infra.*

Should this Court now permit these multimodal bills of lading/contracts of adhesion to apply foreign jurisdiction clauses to U.S.-based railroads and truckers, the practical result will be to bar justice for thousands of cargo claimants, as has in fact indisputably been the result of the *Sky Reefer* decision. One study on the subject concluded that when such forum selection clauses exist, only 11.8% of U.S.-based maritime cases, which were originally pursued here, are ever pursued in a foreign forum:

> Overall, the responses to our survey show overwhelmingly that it is unrealistic to assume that the plaintiff's claim will be pursued in the foreign forum if it is dismissed or stayed from the US court. In only four of the 34 cases about which we received

> responses (or 11.8%) were any steps taken to bring the case before the chosen foreign forum. In one of those four cases, the case was settled 'soon after' proceedings had been instituted in the foreign forum; in another, the claim was held by the foreign forum to be time-barred. Thus, only two of the 34 cases (or 5.9%) proceeded to resolution in the forum designated in the forum selection clause. The large majority of cases (24 out of the 34, or 70.6%) settled or were discontinued after dismissal in the United States, and when there was a settlement, it was almost always settlement at a discount. In half of the cases (17 of the 34 cases, or 50%), we know that no steps were taken to bring the case before the chosen foreign forum; that may also be true in other cases about which we received no response to questions 6 or 7.

R. FORCE AND M. DAVIES, JURISDICTION AND FORUM SELECTIONS IN INTERNATIONAL MARITIME LAW 11 (Kluwer Law Int'l 2005).

This result, that presumably valid cargo claims are simply disappearing, is in fact admitted by *amicus curiae* counsel for the P&I Clubs.[15] By extension, such an extreme rate of deferral in the prosecution of

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[15] Chester D. Hooper, *Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or The Definition of Fora Conveniens Set Forth in the Rotterdam Rules*, 44 TEX. INT'L L.J. 417, 423-25 (2009).

meritorious claims permits foreign carriers to be less careful and to take fewer precautions in caring for U.S. cargoes. Those who damage cargo now routinely get a free ride.

Thus, if the lower Court's decision is reversed, carriers like China Ocean Shipping Company ("COSCO"), for example, that are already legally permitted to force small U.S. importers of goods to sue in China to collect on a $10,000 claim—in itself a gargantuan hurdle rarely jumped—would be in a position to contractually require that such a lawsuit, whether brought against them directly or their U.S. inland carriers, be filed, and service completed, in China within a matter of months. Should a time limit of even one year to sue and serve (as was upheld in *Altadis USA, Inc. v. Sea Star Line LLC*, 458 F.3d 1288, 1290 (11th Cir. 2006)) appear in the bill of lading, since service in China easily takes 6-8 months,[16] the process would have to start long before most cargo insurers have had time to review and investigate the underlying claim and prepare it for subrogation. The net result of reversing the lower Court's ruling would thus be to routinely exonerate foreign carriers like COSCO, and their sub-contractors, from ever having to pay for their negligence. The result? Again, fewer precautions taken and even more negligent conduct with respect to cargoes delivered in the United States.

In contrast, the whole purpose of the 2 year minimum time to sue in Carmack is to give the parties

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[16] Information provided by APS International Ltd. based in Minneapolis, Minnesota, a leading provider of service of process abroad.

(and their insurers) sufficient time to investigate and resolve difficult claims without resort to lawyers. If the lower court decision is reversed, parties will have no choice even for small, routine claims but to immediately get on a plane, retain foreign counsel, rush into a foreign court, and hire a foreign process server, thereby effectively adding a one-direction foreign litigation "tax" on American manufacturers.

Ultimately, there are several reasons why allowing the railroad industry to end run the Carmack Amendment could be disastrous for shippers.

First, the structure of the shipping industry is such that alternative freight costs charged by carriers if a value is declared are often prohibitively high.[17] As seen above, just 20 liner service companies control 80% of the world container trade; in contrast, in 2006 the U.S. alone had, as noted above, 17 million small businesses and roughly 248,000 export shippers.[18] For specific routes, the number of carriers are very modest indeed, and with economic retrenchment on the horizon, the numbers will almost certainly get smaller.

Second, it is well known that under the present limits of liability selected shippers (particularly those with

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[17] *See, e.g., Industrial Maritime Carriers (Bahamas), Inc. v. Siemens Westinghouse Power Corp.*, No. 02-30856, 2003 WL 21196176, at *1-3 (5th Cir. 2003) (upholding an *ad valorem* rate of 6% cargo value as reasonable and not a denial of fair opportunity).

[18] U.S. Census Bureau, *Profile of U.S. Exporting Companies* (Apr. 9, 2009), *available at* http://www.census.gov/foreign-trade/Press-Release/edb/2007.

larger resources) purchase their own cargo insurance. This is prudent behavior and to insure one's belongings has long been recognized as a social good. However, a classic agent-principal or third-party payment dilemma then comes into play, wherein shippers are in actuality negotiating on the part of the third-parties. By the time the principals, the cargo underwriters, see the claims – usually years later – such shipper employees may no longer be in a position to be held accountable for their actions. While such a course of conduct should (in theory, and assuming perfect competition) ultimately reach an equilibrium when cargo underwriters adjust their premiums upward to account for the increased exposures, in the meantime, significant societal losses have already been incurred.

Finally, by deregulating railroads and allowing *de minimus* low liability limits (with no choice of Carmack terms) public policy itself is frustrated. Such low liability limits have the unfortunate consequence of stripping incentive for carriers to perform diligently.[19]

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[19] This situation is known as "underdeterrence." As explained by Judge Richard Posner in his classic text ECONOMIC ANALYSIS OF THE LAW (3rd ed., Little Browne 1986) at pp. 186-187:

> To permit the defendant to set up my insurance policy as a bar to the action would result in underdeterrence. The economic cost of the accident, however defrayed, is $10,000, and if the judgment against him is zero, his incentive to spend up to $10,000 (discounted by the probability of occurrence) to prevent a similar accident in the future will be reduced.
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> * * * *

(Cont'd)

Having cargo insurers pay for foreign or railroad carrier negligence accomplishes nothing more than to shift the burden of bearing the costs of a carrier's lack of care, caused by underdeterrence, to the manufacturers or buyers of goods. Though cargo insurers would initially foot the bill for such shortcomings, U.S. consumers will ultimately suffer the harm in the form of increased costs resulting from volume contracts which have no liability floor. As the world's largest nation of importers, this, over time, will seriously impact American business.

It is important to keep in mind as set forth in the Second Circuit's detailed analysis in *Sompo Japan Insurance Company of America v. Union Pacific Railroad Company*, 456 F.3d 54, 68 (2d Cir. 2006), that this Court's decision in "*Woodbury* [254 U.S. 357 (1920)] and the Act of February 28, 1920 (ratifying the *Woodbury interpretation*) clearly establishes that the ICC's jurisdiction includes transportation from a foreign country to the United States." The plain language in the present Carmack Amendment confirms that the statute covers the inland portion of the transportation at issue (as discussed in detail in Point I of Respondents' Brief).

The ICC itself, in its Exempt Order 390, 46 Fed. Reg. 14348, 14348-14351 (Feb. 27, 1981), explained that 49

(Cont'd)

> If compensation is the only purpose of the negligence system, it is a poor system, being both costly and incomplete. Its economic function, however, is not compensation but the deterrence of inefficient accidents.

U.S.C. § 10502(e), the Staggers Amendment, applied to trailer on flatcar/containers on flatcar (TOFC/COFC) shipments. 49 C.F.R. §§ 1039, 1090, 1300 (1981). As COFC shipments refer to the rail carriage of ocean containers and TOFC refer to the rail carriage of motor carrier trailers, the Commission thus effectively mandated that the Carmack Amendment governs the entire U.S. domestic transportation industry for inland U.S. carriage. *See also Quasar Company v. Atchicson, Topeka and Santa Fe Ry. Co.*, 632 F. Supp. 1106, 1109-1110 (N.D. Ill. 1986).

Hence, even in the face of some ambiguous lower court decisions suggesting the need for a separate inland bill of lading,[20] in view of the *Woodbury* decision, the plain language of Carmack, the ICC Exempt Order, and the fact that rail waybills are issued for virtually all rail carriages (as discussed *infra* Point IV), the transportation industry has operated and acted for decades on the premise that U.S. inland movements of multimodal shipments are covered by Carmack.

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[20] *See* cases cited at Respondents' Brief, p. 32.

II

The Railroad Industry Itself Has Repeatedly Insisted That Multimodal Claims Are Subject to the Carmack Amendment. They Are Thus Now Equitably Estopped From "Bait and Switching" American Manufacturers by Arguing Precisely the Opposite

During recent negotiations over The Rotterdam Rules, a recently drafted international convention on cargo claims[21] which is expected to be widely enacted, the American railroad industry used their considerable influence to quash attempts to achieve uniformity in handling cargo claims in the United States by insisting that they were already strictly regulated by the Carmack Amendment with respect to precisely the type of inland multimodal cargo claims at issue in this litigation.[22] Specifically, the very same Association of

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[21] In September 2009, the United States became a signatory to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), G.A. Res. 63/122, Annex, U.N. Doc. A/RES/63/122 (Dec. 11, 2008). If ratified by the President with the advice and consent of the Senate, the Rotterdam Rules would alter the liability regime for international transportation of cargo involving the United States when the transportation is partly by sea and partly by land, but would not cover inland carriers. *See id.* at arts. 12, 17, 18(d). Surprisingly, the discussion of the Convention in the United States' *amicus* brief fails to mention that it will not cover railroads. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, p. 11.

[22] Of course, AAR knew that once ratified the treaty terms would be applied in the United States federal courts as the law of the land, and that Carmack would be applicable to inland multimodal cargo claims.

American Railroads (AAR), as are *amicus curiae* here, filed formal comments[23] with UNCITRAL[24] expressing its strong opposition to any proposal that the new regime (then known as "the Draft Instrument") should cover the liability of inland rail carriers:

> The U.S. and Canadian railroad members of the AAR have serious concerns over the application of the Draft Instrument to rail transportation. **There is already an existing and well established system in the U.S. and Canada which governs the liability of rail carriers for loss and damage to goods transported and the rights and obligations of both the rail carrier and the shipper.** This system was promulgated by legislation and developed through litigation and regulatory agency action interpreting and applying the legislation.[25]

(emphasis added).

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[23] *See e.g., Proposals by the International Road Transport Union (IRU)*, at 1, U.N. Doc. A/CN.9/WG.III/WP.90 (Mar. 27, 2007); *Drawing up of a New Convention on the Carriage of Goods by Sea and Extending This Convention to Door-to-Door Transport Operations (Comments on Behalf of the IRU) in UNCITRAL*, Compilation of Replies to a Questionnaire, at 43, U.N. Doc. A/CN.9/WG.III/WP.28 (Jan. 31, 2003).

[24] UNCITRAL ("United Nations Commission On International Trade Law") was the UN commission which studied, held hearings and ultimately drafted the Rotterdam Rules.

[25] Comments on Behalf of the Association of American Railroads (AAR) Relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea in UNCITRAL. *See supra* note 21, U.N. Doc. A/CN.9/WG.III/WP.28, at 32.

In the United States, of course, that "existing and well established system" is the Carmack Amendment. The AAR itself described the Carmack Amendment without qualification as "the statute providing the underpinning upon which the system of liability for loss and damage to [multimodal] transported goods is based." *Id.* at 33 n.3.

The AAR added "that the U.S. and Canada already have in place a uniform and well understood system of handling rail freight loss and damage claims which meet[s] the needs of the parties involved." *Id.* at 33 (footnote omitted). In contrast, "the Draft Instrument would adversely modify the current system applicable to U.S. and Canadian railroads." *Id.* at 34.

The AAR was adamant that "[t]he Draft Instrument's scope should therefore not be extended to apply to the land portion of any cargo transportation to the extent it adversely affects the current liability system applicable to U.S. and Canadian railroads."[26]

In short, the railroads repeatedly, consistently and effectively insisted that any maritime regime should not apply to them, even though it was explicitly being designed to cover on a door-to-door basis for the full multimodal journey, because they preferred to *continue* to be exclusively governed by the Carmack Amendment.

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[26] *Id.* These sentiments were also expressed in the AAR's comments submitted at about the same time to the U.S. Government. *See* Comments on Behalf of the Association of American Railroads, docket no. MARAD-2001-11135-12 (Maritime Admin., Dep't of Transp., filed Sept. 13, 2002).

Commenting on the Railroad's successful Rotterdam Rules lobbying effort, one commentator has now summarized deftly:

> What is the explanation for the Rotterdam Rules' failure to address such an obvious and pressing problem? Why did UNCITRAL not include railroads and motor carriers in the new Convention? The simple answer is that [the railroad] industry does not want it. In both Europe and North America, inland carriers (particularly the railroads) were highly vocal about their desire to be excluded from the new regime.
>
> * * * *
>
> The record thus demonstrates that the railroads' rhetoric about "uniformity" when criticizing *Sompo* is simply empty rhetoric. When faced with the very real prospect of a legal regime that extended the ocean carrier's defenses and limitations inland to protect all of the performing parties involved in multimodal transactions—which is exactly what they say good public policy mandates in the *Sompo* context—they blocked the effort. The record proves that their goal cannot be uniformity. It instead appears that their true goal is simply to reduce their liability for the damages that they have caused. While this may be a good business practice that benefits their shareholders, **uniformity and good public policy have little to do with their position.**

Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. MAR. L. & COM. 1, 36-39 (2009) (emphasis added).

The Railroads have not just wrapped themselves in the shield of Carmack to avoid international regulation; the railroad-side has used it as a sword domestically to reap financial benefits and to avoid judgments (at least where a domestic waybill is also issued). *See, e.g.*, *Nippon Yusen Kaisha v. Burlington Northern and Santa Fe R.R.*, 367 F. Supp. 2d 1292, 1296-98 (C.D. Cal. 2005) (railroad successfully argued Carmack applied to inland U.S. loss on inbound multimodal shipment from abroad); *NYK Line v. Burlington Northern and Santa Fe Ry. Co.*, 222 F. Supp. 2d 1176, 1178-79 (C.D. Cal. 2002) (railroad successfully argued Carmack applied to inland U.S. loss on outbound multimodal shipments); *Burlington Northern and Santa Fe R.R. v. Hyundai Merchant Marine Co.*, No. CV 96-9123-MMM, 1999 WL 1122998, at *8 (C.D. Cal. 1999) (same).

In fact, the case at issue was actually removed from state court by Union Pacific based, in part, on the representation that it was governed by the Carmack Amendment. JA67-68.

Here the Railroads have in effect taken a contrary position in front of the United Nations and now seek to repudiate that position to gain an advantage in later proceedings. The doctrine of judicial estoppel prohibits such gamesmanship. *State of New Hampshire v. State of Maine*, 532 U.S. 742, 749-50 (2001). *See also, Chaveriat v. Williams Pipe Line Company*, 11 F. 3d 1420, 1427

(7th Cir. 1993) ("though called judicial estoppel the doctrine has been applied to proceedings in which a party to an administrative proceeding obtains a favorable outcome that he seeks to repudiate in a subsequent judicial proceeding"). The Railroads got what they wanted—a treaty which does not apply to inland multimodal transport.

Judicial estoppel protects the judicial process by prohibiting parties "from deliberately changing positions according to the exigencies of the moment." *State of New Hampshire v. State of Maine*, 532 U.S. at 750, *citations omitted.* The doctrine prevents the parties from "playing fast and loose with the courts" and the facts. *Id.*

III

In Any Event, This Court Decided Long Ago in *Union Pacific v. Burke* That Carmack Applies to Inland Transport Under a Multimodal Through Bill of Lading Even Though a Separate Bill of Lading Was Not Issued

Long before *Sompo*, this Court itself addressed the issue of whether Carmack applies to the U.S. inland leg under a through bill of lading. In *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317 (1921), a single bill of lading was issued for a shipment via ocean and rail from Japan to New York via San Francisco. The New York Court of Appeals found that the inland loss was subject to the Carmack Amendment:

> Ocean transportation may be conducted under through bills of lading, issued at a

> foreign port, but the classifications and schedules of rates and charges of the inland carrier or carriers must be limited to inland transportation and services, and cannot relate to liability, service, or obligation of the ocean carrier.
>
> The liability of the defendant is not and, under the Carmack Amendment, could not be questioned.

Burke v. Union Pacific R.R. Co., 226 N.Y. 534, 540 (N.Y. 1919). The U.S. Supreme Court affirmed, holding that the inland carriage was subject to common law liability (i.e. Carmack) and that the bill of lading limitation was ineffective because no full liability Carmack option was offered. *Union Pacific R.R. Co. v. Burke*, 255 U.S. 317, 321 (1921).

Since *Burke*, however, there has been confusion as to the applicability of the Carmack Amendment to inland carriers where there is an import shipment moving under a multimodal through bill of lading. Most of the confusion can be traced to *Reider v. Thompson*, 339 U.S. 113 (1950). The Court rejected the rail carrier's argument that Carmack did not apply to the inland U.S. rail carriage. The opinion in *Reider* reflected that Carmack was intended to cover the domestic portion of movements originating in foreign countries:

> The purpose of the Carmack Amendment was to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling an

> interstate shipment of goods. To hold otherwise than we do would immunize from the beneficial provisions of the Amendment all shipments originating in a foreign country when reshipped via the very transportation chain with which the Amendment was most concerned. *Id.* at 119.

Moreover, *Reider* does *not* say what would happen if the inland carrier had not issued a separate bill of lading. Nor does it mention the Court's earlier ruling in *Union Pacific R.R. Co. v. Burke*, which indicates that there was no intention of overruling that decision.

IV

If the Existence of an Inland Bill of Lading is the Critical Factor in Determining the Applicable Law, This Case is Not Ripe for Finally Resolving the Issue of the Carmack Amendment's Applicability. The Railroads Concede that if the Rail Carrier Issued an Inland Bill of Lading the Carmack Amendment Applies. No Discovery Has Been Taken on that Issue. Thus, to Resolve This Issue, This Court Must Remand the Case

In the event this Court determines that the Carmack Amendment does not apply to this rail shipment under the K-Line through bill of lading, its holding in *Norfolk Southern Ry. Co. v. Kirby*, 543 U.S. 14, 15 (2004) compels that the case be remanded to determine whether a domestic waybill was issued by the rail carrier, and if so, the effect of its terms. Discovery on that issue was apparently never conducted and so

the issue could not be fully presented to the District Court. For that reason, in part, the Ninth Circuit remanded this matter, calling it contractually a "factual morass." *Regal-Beloit Corp. v. Kawasaki Kisen Kaisha Ltd.*, 557 F. 3d 985, 1002 n.22 (9th Cir. 2009).

Kirby involved an international multimodal shipment under a through bill of lading from Australia to Huntsville, Alabama via vessel and rail. As is typical, the shipper contracted with a forwarder who contracted with an ocean carrier who contracted with the railroad. The Court recognized that the intermediaries between the shipper and the railroad acted as the cargo owner's agent in contracting for the actual transportation.[27] *Kirby*, 543 U.S. at 17.

It is well known in the industry that railroads universally issue domestic "waybills" to the party they immediately contract with in connection with multimodal shipments — typically the ocean carrier. *See, e.g., Scope Imports, Inc. v. Interstate Commerce Commission*, 688 F. 2d 992, 994 (5th Cir. 1982) (describing the ICC's findings that the typical intermodal shipping documents include the intermodal bill of lading and the railroad "waybills" for the inland carriage to destination); *Sompo Japan Ins. Co. of America v. Union Pac. R.R. Co.*, 456 F.3d 54, 76 (2d Cir. 2006) (remanding case to determine, *inter alia*, whether Carmack was offered via the rail carrier's domestic waybills); on remand *Sompo Japan*

[27] The Court pointed out that although the intermediaries are "not the cargo owner's agent in every sense," they do have authority to bind the cargo owner to a liability limitation. *Kirby*, 543 U.S. at 17.

Ins. Co. of America v. Union Pac. R.R. Co., No. 09 Civ. 1604, 2007 WL 2230091, at *5 (S.D.N.Y. 2007) (finding that Union Pacific's domestic rail waybills, while subject to Carmack, did not offer full Carmack liability terms), aff'd 341 Fed. Appx. 707 (2d Cir. 2009), petition for cert. filed, (U.S. Jan. 4, 2010) (09-787).

A domestic waybill evidences a contract of carriage. "Like bills of lading, waybills are contracts for the carriage of goods." *Sompo Japan Ins. Co. of America v. Union Pac. R.R.*, 456 F.3d 54, 56 n.4 (2d Cir. 2006). *As both Union Pacific and Amicus Curiae Association of American Railroads concede,*[28] *under the terms of the Carmack Amendment and established law, such waybill would satisfy any perceived requirement of a separate inland contract and thereby triggering Carmack. Altadis USA, Inc. v. Sea Star Line, LLC*, 458 F.3d 1288, 1291 (11th Cir. 2006); *American Road Service Co. v. Consolidated Rail Corp.*, 348 F.3d 565, 568 (6th Cir. 2003); *Shao v. Link Cargo (Taiwan) Ltd., Inc.*, 986 F.2d 700, 703 (4th Cir. 1993); *Capitol Converting Equipment, Inc. v. LEP Transport, Inc.*, 965 F.2d 391, 394 (7th Cir. 1992). In other words:

> [I]nland carriers are subject to Carmack Amendment liability when a separate, domestic bill of lading is issued, even though a through bill of lading was issued abroad covering the same transport.

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[28] *See* Brief for Petitioner Union Pacific, p. 34; Brief for the Association of American Railroads as *Amicus Curiae* Supporting Petitioners, p. 180.

King Ocean Cent. Am., S.A. v. Precision Cutting Serv., 717 So. 2d 507, 512 (Fla. 1998) (*citing Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1956)).

It is worth noting that all parties concede that inland domestic rail contracts covering the shipments — known as ERTA's did exist here — specific contracts between Union Pacific and each of the shippers, which incorporate by reference Union Pacific's MITA ("UP Exempt Circular 20-B"), which in turn expressly states that it provides terms and conditions for "Intermodal Shipments." *See* Brief of Petitioner Union Pacific Railroad Co., p. 44. Based upon the foregoing principles, and particularly since Carmack provides that the absence of a bill of lading should not affect substantive rights, this Court could find—even if this turned out to be the rare case where a rail waybill is absent—that Carmack applies.

Under *Kirby*, the ocean carrier (the through bill of lading issuer) is deemed to be the cargo owner's agent in contracting with the rail carrier. Hence the domestic waybill (the contract between the ocean carrier and the railroad) needs to be examined to determine which, if any, terms bind the cargo owner. At the very least, the Court would need to examine the inland waybill to determine if it states directly or indicates the party's intent to have it supersede the multimodal bill of lading terms with respect to the relationship between the cargo interests and the inland carrier on liability or jurisdictional issues. These issues are fact intensive and would thus be more properly addressed in the first

instance by the courts below. Absent an affirmance of the Circuit Court's decision, a remand on this domestic waybill issue is required.

Alternatively, should the Court determine that Carmack does not apply to inland multimodal transportation from abroad, the case must be remanded to determine whether a full liability option was offered to the shipper under federal common law. Long before Carmack, the federal common law required that a full liability option be provided to the shipper. *See Hart v. Pennsylvania R.R. Co.*, 112 U.S. 331, 338 (1884). Thereafter, the common law analysis was incorporated into Carmack cases. *New York, N.H. & H. R.R. Co. v. Nothnagle*, 346 U.S. 128, 135 (1953) (which relied upon a string of cases emanating from the "general common law" decision in *Hart*).[29]

Under the released value doctrine, federal law permits carriers to limit their liability only by express agreement with the shipper, under what is known as the "Hughes Test". Thus, to effectively limit its liability, a carrier must: (1) maintain an approved tariff; (2) obtain a shipper's agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a bill of lading prior to shipment. *Hughes v. United Van Lines, Inc.* 829 F.2d 1407, 1419-20 (7th Cir. 1987); The

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[29] Thus, Carmack simply incorporates federal common law principles of inland carriage, including the released value doctrine. *See e.g., Hampton v. Federal Express Corp.*, 917 F.2d 1119, 1121 (8th Cir. 1990) (federal common law applies the same released value doctrine as Carmack)

Hughes Test has its genesis in *New York, N.H. & H. R.R. Co. v. Nothnagle,* 346 U.S. 128, 135 (1953).

It is important to keep in mind that the released value doctrine pertains to effective limitations of liability, which is the central issue in numerous cases including *Sompo Japan Ins. Co. of America v. Union Pac. RR.* Co, 456 F.3d 54 (2d Cir. 2006). It is also applicable to the case at bar. That is, there has been no determination below as to whether a full liability option was offered to the shipper under the *Hughes* test, and if so, whether requiring suit in a foreign forum negates such an offer.

V

If the Transportation Industry Really Wants Uniformity, for a *De Minimus* Cost It Can Extend a Single Clause Already Routinely Present in Multimodal Bills of Lading to Cover the United States Trade and Offer Shippers a Carmack Option

The argument is repeatedly made in the various *amicus* briefs that enforcement of K-Line's Japanese jurisdiction clause against the inland U.S. railroad would promote "uniformity."

Actually, precisely the opposite is the case. The United States has few if any major ocean carriers forcing foreign shippers to litigate here. Moreover, as explained in the seminal work W. TETLEY, MARINE CARGO CLAIMS 1915-26 (4th ed. 2008), the very same jurisdiction clauses that our Court's recognize—for claims against ocean

carriers—are unenforceable in whole or in part in at least the following jurisdictions:

- China (noting that as of 1997 only Dutch and German forum selection clauses were enforceable there)
- Canada
- The European Union (clauses enforced only under restrictive conditions)
- Australia
- New Zealand
- South Africa
- France

No showing has been made that a single foreign country currently permits lawsuits against its railroads (or truckers) for their local activities to be routinely venued in and their employees forced to testify in an overseas country. Under Article 31 of the European CMR Convention, for example, a United States forum selection clause would be unenforceable against a European trucker.[30] Pursuant to the CMR, forum selection clauses are only enforceable if the designated forum is that of a participating nation (which in turn would apply the CMR).[31] Nonetheless, the Railroads

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[30] *See* Convention on the Contract for the International Carriage of Goods by Road (CMR), May 19, 1956, 399 U.N.T.S. 189.

[31] Similarly, if the Carmack Amendment did apply here, it is well established (and the Railroads do not contest) that a (Cont'd)

want our citizens to have to travel across the globe to seek justice.

Independent of this one-sided situation, a crucial fact exists in this case which independently supports the application of Carmack here. The standard K-Line Bill of Lading (and also the one at issue) contains the following clause, applicable everywhere except the United States:

> Clause 3(B)
>
> Carrier's responsibility, if any, for any loss or damage to Goods proven to have taken place during any period other than Water Carriage shall be governed by any relevant provisions contained in any applicable international convention or national law which provisions (a) cannot be departed from by private contract to the detriment of Merchant, and (b) would have applied if Merchant had made a separate and direct contract with Carrier in respect of the particular stage of Carriage during which the loss or damage occurred.

Available at http://www.kline.com/KAMBL_Terms/BL_Terms_Export_Front_Clauses.asp. In fact, TLC's counsel's experience and published decisions reveal that similar clauses exist in most ocean carrier bills of lading.

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foreign forum selection clause would not be enforceable. *Aacon Auto Transport, Inc. v. State Farm Mutual Automobile Ins. Co.*, 537 F. 2d 648, 654-55 (2d Cir. 1976).

See, e.g., Hartford Fire Ins. Co. v. Orient Overseas Containers Lines, 230 F. 3d 549, 553 (2d Cir. 2000); *Mannesman Demag Corp. v. M/V Concert Express*, 225 F. 3d 587, 590 (5th Cir. 2000).

As the bill of lading clearly contemplates a multimodal shipment, the reference to "laws compulsorily applicable under the circumstances" to the participating carrier/trucker can only mean inland laws such as the Carmack Amendment (or such as in Europe, the CMR Convention) which apply independent of the issuance of the bill of lading.

The clause thus establishes that K-Line expressly intended different liability schemes to govern different phases or modes of transportation, in virtually every country *except* the United States. A few adjustments to this simple clause to make it indisputedly applicable to the parallel Carmack Amendment, would thereby put U.S. shippers on equal footing with foreign shippers. Instead, the Railroads are now effectively arguing for this Court to put United States shippers in a deeply weakened, completely unregulated, competitively disadvantaged position.[32]

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[32] Professor Sturley, analyzing the decision in *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R.*, 456 F.3d 54 (2d Cir. 2006), notes that more careful contract drafting would provide a complete and virtually cost-free "solution" to this entire debate. Michael F. Sturley, *Maritime Cases About Train Wrecks: Applying Maritime Law to the Inland Damage of Ocean Cargo*, 40 J. Mar. L. & Com. 1, 36-39 (2009). Numerous other *Sompo* critics are in accord. *See* Paul Keane, *US Law –COGSA Limitations and Intermodal Transport*, 192 Gard News 22, 24 (2008).

Finally, it is important to note that nothing in Carmack, either in its present form or its history, suggests that a carrier can make an offer of full liability to anyone other than the actual shipper (the owner of the goods). That is, an offer to another carrier – i.e. from the railroad to an intermodal bill of lading issuer — is simply not authorized by the language in Carmack. For the Court to permit such an offer to be made would be for the Court to legislate and to validate a procedure which Congress never approved. The offer must be made to the actual shipper. *Burke v. Union Pac. R. R. Co.*, 226 NY 534 (1919), aff'd *Union Pac. R. R. Co. v. Burke*, 255 U.S. 317, 321 (1921). It would be a simple matter for the railroads to contract with their multimodal partners to insert an offer of full Carmack liability right in the multimodal bill of lading. In fact, as discussed above, this is exactly what the multimodal carriers have done regarding inland shipments for countries other than the United States. There would be no cost or burden to require the full Carmack option to be specifically included in such a bill of lading clause.

CONCLUSION

The decision of the court below should be affirmed. In the alternative, the case should be remanded to resolve the matter of the existence of and the precise jurisdictional terms of the Railroad's waybill.

Respectfully submitted,

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